OVERSEAS UNION BANK (M) BHD

v.

L & L PROPERTIES SDN BHD

HIGH COURT MALAYA, IPOH
CLEMENT SKINNER JC
[ORIGINATING SUMMONS NO: 24-911 OF 1998]
30 APRIL 1999

LAND LAW: *Charge - Notice of default - Form 16D - Service - Form 16D served after period for payment in notice of demand lapsed - Whether prematurely issued - National Land Code 1965, s. 254*

CIVIL PROCEDURE: *Affidavits - Order for sale - Supporting affidavit - Affidavit stating only outstanding balance of principal loan - Whether defective - Whether contravened O. 83 r. 3 Rules of the High Court 1980*

The defendant had secured overdraft facilities from the plaintiff, after executing debentures and charges over 18 pieces of its land in favour of the plaintiff. The plaintiff alleged that the defendant had not satisfactorily operated its overdraft account and had breached the terms of the facilities, and on that score, on 17 July 1998, it attached a notice of demand onto the defendant's premises requiring the latter to repay the outstanding amount of RM557,215.28 within seven days. The plaintiff did not receive payment as demanded, and on 5 August 1998, it sent the defendant the Form 16D statutory notice of default pursuant to s. 254 National Land Code 1965 ('NLC'). In essence, the said Form 16D required that the defendant pay the aforesaid outstanding sum within 14 days, failing which the plaintiff would apply for an order for sale of the charged land. No payment was received from the defendant, and on 21 September 1998, the plaintiff filed its application for sale. The facts showed, however, that, in the affidavit in support of the application for sale in question, the plaintiff had only particularised the balance of the loan amount, and had not stated the amount it had advanced and the repayments made therefor. The defendant opposed the application and argued before the learned Judicial Commissioner that (i) the application for sale was premature as the Form 16D notice was issued prematurely; and (ii) the application must fail as there was non-compliance with O. 83 Rules of the High Court 1980 ('RHC').

Held:

[1] The question of prematurity does not at all arise. The question of whether the Form 16D was issued prematurely must be determined by looking at the period stated in the notice of demand for repayment and not in the Form 16D notice. The facts showed that the seven days stated in the

plaintiffs notice of demand served of 17 July 1998 had lapsed on 24 July 1998, and that being so, the plaintiff has every right to issue the Form 16D notice and serve it on the defendant. An examination of the Form 16D issued also shows that the plaintiff has complied with the statutory requirements in s. 254 NLC.

[2] The plaintiff has not complied with the requirements of O. 83 r. 3(3) RHC when it failed to state the amount of the advance and the amount of repayments made therefor. Clearly, in the absence of these particulars, it was not open for the plaintiff to have contended, as it did, that its affidavit had disclosed sufficient material respecting the manner the debt came about and what was owed under the charge.

[3] The plaintiffs non-compliance aforesaid does not afford the defendant the opportunity to determine the exact sum it was to pay, and the court, equally, cannot with confidence say what the total outstanding amount was. This being the case, irrespective of the fact that the defendant had written to the plaintiff proposing the terms of repayment, it was in no way precluded from pointing out the non-compliance so as to show cause against the making of an order for sale.

[Application dismissed.]

Case(s) referred to:

Asia Commercial Finance v. Kimden Housing Development Sdn Bhd [1993] 1 MLJ 283 ***(refd)***

Citibank NA v. Ibrahim Othman [1994] 1 MLJ 608 ***(refd)***

Kekatong Sdn Bhd v. Bank Bumiputra (M) Bhd [1998] 2 CLJ 266 ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 ***(refd)***

Legislation referred to:

National Land Code 1965, ss. 254, 256, 257(1)(c)

Rules of the High Court 1980, O. 83 r. 3(3)(a), (c), (7)

For the plaintiff - A Selvanathan; M/s Kean Chye & Sivalingam

For the defendant - Awtar Singh Gill; M/s Awtar, Ghazali, Augustine & Co

Reported by WA Sharif

JUDGMENT

Clement Skinner JC:

This is an application by the plaintiffs, a bank, to enforce its statutory charge by way of an order for sale of 4 pieces of land namely:

HS (D) KA 28872 PT. NO. 124803

HS (D) KA 28889 PT. NO. 124880

HS (D) KA 28890 PT. NO. 124881

HS (D) KA 28895 PT. NO. 124886

all in the Mukim of Ulu Kinta, District of Kinta, Perak (the said lands) owned by the defendants and which were charged to the plaintiffs in circumstances described below.

On 12 April 1994, the plaintiffs pursuant to a request from the defendants offered the latter overdraft facilities (O.D.) of RM475,000 in consideration whereof the defendants on 21 April 1994 executed a first debenture and first charge over 18 pieces of land, including the said lands. The charge was registered *vide* presentation No. 14297/94 Volume No. 5624 Folio No. 21.

About a year later, at the request of the defendants, the plaintiffs on 31 January 1995 granted the defendants additional OD facilities in the sum of RM728,000 in consideration of which the defendants on 16 January 1995 executed a second debenture and second charge over the 18 pieces of land abovementioned. This second charge was registered *vide* presentation No. 929/95 Volume No. 6078, Folio No. 15. The total OD facilities granted by the defendants therefore amounted to RM1,203,000.

By a letter of offer dated 8 July 1995, the plaintiff continued to offer the defendants overdraft facilities but in a varied amount, limited to RM1,021,000. The OD continued to be secured by the existing debentures and charges.

Over a period of time the defendants redeemed 14 of the 18 lands charged to the plaintiffs and in that process the plaintiffs reduced the OD limit to RM525,500 which sum remains secured by the said lands. The plaintiffs say the defendants have conducted or operated their overdraft account in an unsatisfactory manner and in breach of the terms of the borrowing.

Accordingly, on 30 June 1998, the plaintiffs caused to be sent to the defendants, a demand to repay the outstanding amount of RM557,215.28 as at 26 June 1998 within seven days from the date thereof. This demand was served by the plaintiffs' solicitors on the defendants at two different addresses employing three methods, namely by A.R. Registered post and by Certificate of Posting addressed to the defendants at:

(i) 487-B Jalan Pasir Puteh, 31650 Ipoh (the Pasir Puteh address);

(ii) No. 112-1 1st Floor, Jalan Kampar, 30250 Ipoh (the Jalan Kampar address).

The plaintiffs' solicitors also caused to be attached to the front door of the premises at the Pasir Puteh address the notice of demand on 17 July 1998. The Pasir Puteh address was given by the defendants as the address of their registered office in the first charge. When the defendants executed the second charge, they gave the Jalan Kampar address as the address of their registered office and the Pasir Puteh address as their place of business.

When the plaintiffs did not receive repayment as demanded, they caused to be sent to the defendants a statutory notice of default in Form 16D pursuant to s. 254 of the National Land Code (NLC). This Form 16D notice dated 5 August 1998 was again sent to the defendants at their Pasir Puteh and Jalan Kampar addresses by the plaintiffs' solicitor employing the three above mentioned methods.

The Form 16D notice sent to the defendants requires them to pay the sum of RM557,215.28 within 14 days from the date of service failing which an order for sale would be applied for. When no payment was received from the defendants, the plaintiffs filed their application for sale herein on 21 September 1998.

In the affidavit of Saw Ki Liong affirmed on 21 September 1998 (plaintiffs' first affidavit) in support of their application, the plaintiffs have indicated the status of the defendants' account by giving particulars of the amount owing. In para. 13, the plaintiffs begin by stating the "Balance of Principal Loan Amount" (as at 12 November 1997) as RM525,500 and then adding accrued interest as at 31 August 1998 thereby making a total sum owing of RM578,156.41.

After the filing of the originating summons herein, the plaintiffs filed a corrective affidavit to amend the OD figure from RM1,023,000 to RM1,203,000 the first figure having been wrongly typed. I find nothing turns on this amendment which was obviously necessitated by a typing error.

The defendants oppose this application for sale and have filed two affidavits to show cause against the making of an order for sale. Several matters are raised therein but when this application was heard, Mr. Awtar Singh, learned counsel for the defendants stated that the defendants intend to show cause to the contrary on two grounds:

(i) this whole action is premature as the statutory notice in Form 16D was issued prematurely;

(ii) there has been non-compliance with O. 83 Rules of the High Court 1980 (RHC).

Is The Whole Action Premature

It is the defendants' case that when the plaintiffs sent their demand for repayment to the defendants by A.R. Registered post and Certificate of Posting to their Pasir Puteh address, the A.R. Registered letter was returned "unclaimed". As such there was no demand on the defendants by this method. In respect of the A.R. Registered letter sent to the Jalan Kampar address, this was acknowledged by someone other than the defendants, namely "CWC Services & Trading". It is counsel's submission that since the plaintiffs had already done a search on the defendants at the Registrar of Companies before they sent out their demand, this search would have revealed that the defendants had given their principal place of business as well as their registered address as their Pasir Puteh address. In these circumstances, submits counsel, the plaintiffs must have been aware of the change of the defendants' principal place of business and therefore the demand served at the defendants' Jalan Kampar address is bad. In support of his contention counsel cites the case of *Kekatong Sdn. Bhd. v. Bank Bumiputra (M) Bhd.* [1998] 2 CLJ 266; [1998] 2 MLJ 440.

Counsel for the defendants then goes on to say that when the plaintiffs attached the notice of demand to the door of the premises at their Pasir Puteh address on 17 July 1998, that constituted good service of the demand for repayment in accordance with the annexure of charge.

Counsel then referred to the Form 16D which is dated 5 August 1998 and to para 3 thereof which reads:

> And whereas the breach has continued for a period of at least one month prior to the date of this notice.

Counsel submits that the word "prior" in the above paragraph must refer to the notice of demand served on 17 July 1998 and since para. 3 speaks of the breach continuing for at least one month prior to the notice, that one month would only expire on 16 August 1998. As the form 16D was dated 5 August 1998, it has been served prematurely wherefore this whole action being founded on the Form 16D is bad. It is counsel's submission that even though the terms of the charge requires that the plaintiffs only give the defendants seven days from date of demand to repay, since the Form 16D mentions 30 days, the plaintiffs are bound to honour the same.

I regret I do not regard the reasons advanced above as showing cause to the contrary and say so for the following reasons.

Firstly, the notice of demand served on the defendants on 17 July 1998 gave the defendants seven days and not 30 days to repay. The letter of demand could not be expressed in clearer terms and ends in this way:

Our clients HEREBY DEMAND payment of the said sum of RM557,215.76 with interest as aforesaid within seven (7) days from the date hereof.

TAKE NOTICE that if payment is not made within the time herein stated our clients will have no alternative but to take such steps as they may be advised pursuant to the Debenture dated 20.5.94 and 16.1.95.

AND FURTHER TAKE NOTICE that our client will also apply to court for an order of sale by public auction of the properties charged to them by you for the above Account.

Secondly, s. 254 specifies what matters must be stated in the Form 16D notice. They are:

(1) the breach in question should be specified;

(2) the notice must require that breach to be remedied within one month of the date of notice of service of the notice or such other period as may be specified in the charge;

(3) a warning that if the chargor fails to comply with the notice, proceedings will be taken to obtain an order for sale of the property charged.

An examination of the Form 16D issued in this case shows that the plaintiffs have complied with the statutory requirements in s. 254 in that the notice identifies the breach as being the defendants' failure to comply with the notice of demand dated 30 June 1998; that the defendant is given 14 days from service of the notice to remedy that breach failing which an application for an order of sale will be made.

In my judgment, the seven days stated in the plaintiffs' notice of demand served on 17 July 1998 had elapsed on 24 July 1998. Once that happened, the plaintiffs had every right to issue the Form 16D notice and serve it on the defendants. In my view, the fact that the Form 16D notice contains a statement that the breach complained of has continued for a period of one month prior to the date of the notice does not vitiate the same or render it bad as being premature, because the question of whether the Form 16D is issued prematurely must be determined by looking at the period stated in the notice of demand for repayment and not in the Form 16D notice as suggested by the defendants. When that is done, it will be seen that the question of prematurity does not arise.

Was There Non-Compliance With O. 83 RHC

It is the submission of counsel for the defendants that the plaintiffs have not complied with O. 83 r. 3(3) RHC which requires that the plaintiffs show in its affidavit the state of the account between the plaintiffs and defendants by providing particulars of:

(a) the amount of the advance;

(b) the amount of the repayments;

(c) the amount of any interest or installments in arrears at the date of issue of the originating summons and at the date of the affidavit;

(d) the amount remaining due under the charge.

Counsel submits that in its affidavit affirmed on 30 November 1998 (plaintiffs' second affidavit), the plaintiffs have given the following particulars of account:

Pinjaman Wang Pokok ... RM525,500.00

Counsel says that this particular is incorrect because O. 83 r. 3(3)(a) requires "the amount of the advance" to be stated. In this case, the principal amount borrowed is some RM1.2 million. Counsel says the plaintiff should have stated the actual amount advanced, then they should have shown repayment on 14 of the 18 titles that have been redeemed but there is no particulars of these repayments whereas it is clear from cl. 39 of the annexure of second charge that until a demand for repayment is made, the defendants would repay the facility by 36 monthly instalments of RM27,000 each or by redemption sums of RM108,600 to RM205,000 per title deed. Because the plaintiffs have failed to particularise the amount of repayments, the defendants do not know at what sums the 14 titles were redeemed. In support counsel refers to *Asia Commercial Finance v. Kimden Housing Development Sdn. Bhd.* [1993] 1 MLJ 283 where it was held that non-compliance with O. 83 r. 3(3)(c) and (7) deprived the defendants of knowledge of the exact amount outstanding and interest due under the charge which rendered the order for sale liable to be set aside.

Counsel for the defendants goes on further to point out that in the plaintiffs' affidavit affirmed on 26 January 1999, (plaintiffs' third affidavit) para. 10 thereof acknowledges that the defendants have paid off a temporary overdraft of RM50,000 on 17 February 1995. Counsel says this should have been shown as a repayment but was not. Counsel then cites the case of *Citibank N.A. v. Ibrahim bin Othman* [1994] 1 MLJ 608 where it was held that it is incumbent on a plaintiff to provide the statutory particulars mentioned in O. 83 r. 3(3) RHC.

In reply to these complaints, Mr. Selvanathan, learned counsel for the plaintiffs submits that the defendants insistence on compliance with O. 83 r. 3(3) is unjustified as the court is not to concern itself with whether a proper account of the money paid by the defendants to the plaintiffs have been given and cites in support the case of *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 1 MLJ 77 at p. 88 para H where it is stated that a judge hearing an application under s. 256 should not concern himself with matters such as whether or not a proper account has been given of sums paid by a borrower.

Counsel for the plaintiffs submits that O. 83 r. 3(3) will be procedurally complied with if the affidavits in court disclose sufficient material to show how the debt came about and what is owed under the charge. Counsel then refers to the various affidavits filed by the plaintiffs to show how this is achieved. First counsel refers to the plaintiffs' first affidavit where it is stated in para 6 that the total overdraft facility was RM1,203,000 (after correction). Para 8 then states that the OD was reduced to RM525,500 by the redemption of 14 titles. There was thus a means by which the defendants were able to discern and calculate the amounts repaid. In addition, statements of accounts have been rendered to the defendants which have never been queried before. Above all, the plaintiffs say the defendants really have no complaint regarding the state of their account, which has been in operation since 1994, because after these proceedings were commenced on 21 September 1998, the defendants wrote to the plaintiffs on 8 January 1999 (exh. SKL 7 of encl. 13) making proposal for settlement of the debt. This, submits counsel for the plaintiffs, is open admission of the debt and the inability of the defendants to pay the outstanding debt.

Having considered these competing submissions, I find that the plaintiffs have not complied with the statutory requirements of O. 83 r. 3(3). The sub-rule is quite explicit as to what particulars have to be stated in an affidavit supporting an application for sale. The "amount of the advance" and "amount of the repayments" must be stated. The plaintiffs have stated the "balance of principal loan amount" which in my opinion is quite different from the amount advanced. Secondly, there is a complete absence of any particulars of repayment in all the affidavits of the plaintiffs. The plaintiffs themselves say in para. 8 of the affidavit of Saw Ki Liong affirmed on 21 September 1998 that there have been repayments but have not provided any particulars of the amount of such repayment. In the absence of stating an amount representing the sums repaid, the plaintiffs' submission that their affidavits disclose sufficient material to show how the debt came about and what is owed under the charge cannot be supported. I would point out here that whilst counsel for the defendants seems to suggest that the plaintiffs must give full particulars of the repayments made by itemising each of them, I do not think O. 83 r. 3(3) imposes any such obligation on the plaintiffs. To comply, the plaintiffs need to state the amount repaid.

Whilst I agree with learned counsel for the plaintiffs that if there has been substantial compliance with O. 83 RHC the court can exercise discretion to excuse minor omissions if no real prejudice would result to the defendants, as advocated by Shankar J in *Citibank NA v. Ibrahim Othman (supra)*, I find that I cannot regard the omissions here as minor because even if it can be gathered from the affidavits that the amount of the advance was RM1,203,000,

without having stated the amount of repayments made, the objective of O. 83 r. 3 RHC, namely, "to enable the defendant to know at least by the date the originating summons is filed what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up", is not achieved (See: *Citibank NA v. Ibrahim Othman (supra).* Now that the defendants dispute the true state of its owing, the non-compliance of the plaintiffs with O. 83 r. 3(3) do not afford it the opportunity to determine the exact sum it is to pay. Similarly, if an order for sale is to be made, the court cannot with any measure of confidence say precisely what "the total amount due to the chargee at the date on which the order is made" is which is a mandatory requirement of s. 257(1)(c) NLC as pointed out in *Citibank NA v. Ibrahim bin Othman*. I do not think that just because the defendant has written to the plaintiff proposing terms of repayment that the defendant is precluded from pointing out the non-compliance with O. 83 to show cause against the making of an order for sale.

I accept, as I am bound to, the statement made in *Low Lee Lian's* case that the court is not to concern itself on an application of this nature with whether the plaintiff has given a proper account of the money paid by the defendant, but it is also stated in that same judgment that a judge hearing an application under s. 256 must ensure that the procedural requirements prescribed by O. 83 of the Rules of the High Court 1980 have been complied with.

In the result, as the defendants have shown cause to the contrary on this ground, I order that the plaintiffs' application be dismissed with costs.